80-1009

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM LAWRENCE LENTZ ~~AND RAYMOND CLINTON HULLUM, JR.~~,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

On ~~Writ of~~ Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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FOR PETITIONER
WILLIAM LAWRENCE LENTZ

QUESTIONS PRESENTED FOR REVIEW

1. Whether a phone number with an area code and "Continental" constitute sufficient evidence to prove beyond a reasonable doubt that a wire communication is furnished by a person engaged as a common carrier in providing facilities for transmission of interstate communications?

2. Whether undisputed evidence that a private citizen had never heard of the scheme to wiretap until he was asked to participate by law enforcement officers constitutes entrapment as a matter of law when the only evidence to show predisposition is the private citizen's conduct after he was induced to participate?

3. Whether the conduct of three law enforcement officers, who designed a scheme to wiretap and then induced a private citizen to participate in the scheme, is so outrageous that to allow the private citizen to be convicted would deny him due process of law?

4. Whether *Sandstrom v. Montana*, 442 U.S. 510 (1979) has changed the law regarding jury instructions on intent as stated in *United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977)?

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No.

IN THE
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WILLIAM LAWRENCE LENTZ AND
RAYMOND CLINTON HULLUM, JR.,
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versus

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On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

Petitioner, WILLIAM LAWRENCE LENTZ, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on August 25, 1980.

OPINION BELOW

The opinion of the Court of Appeals may be reported at ____ F.2d ____. A copy of the slip opinion is attached as Appendix A. It is not known whether the opinion has been reported at this time.

JURISDICTION

The judgment and opinion of the Court of Appeals in this case were entered on August 25, 1980. (See Appendix A). The Petitioner filed a Petition for Rehearing and for Rehearing En Banc, which was denied by the Court of Appeals on November 3, 1980. A copy of the order denying the Petition for Rehearing and for Rehearing En Banc is attached as Appendix B. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and pursuant to Rules 17 and 19 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

2. Wire Interception and Interception of Oral Communications, 18 U.S.C. §§2510(1), (10) and 2511(1)(a):

§2510(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire . . . between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

§2510(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code;

§2511(1)(a) . . . any person who — willfully . . . endeavors to intercept . . . any wire . . . communication . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. Federal Rules of Evidence, Rule 201(b), (f), (g):

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceedings.

(g) Instructing jury. . . . In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

STATEMENT OF THE CASE

Petitioner William Lawrence Lentz [hereinafter referred to as Lentz] was initially charged along with a sheriff and a deputy sheriff with endeavoring to illegally intercept a wire communication and with conspiracy to endeavor to illegally intercept a wire communication in violation of 18 U.S.C. §2511(1)(a) and 18 U.S.C. §371. A jury found Lentz guilty of three counts in the indictment, after the trial court had granted Lentz's motion for judgment of acquittal as to Count Four in the indictment. At sentencing the Government elected to proceed only on Counts One and Three in the indictment against Lentz. On July 31, 1979, Lentz was sentenced to one year imprisonment, but was ordered to be released as if on parole after serving six months of the sentence. Lentz timely appealed from the District Court's Judgment, and his conviction was affirmed by a panel of the Court of Appeals for the Fifth Circuit on August 25, 1980. Lentz's request for a rehearing by the panel or rehearing en banc was denied by the Court of Appeals on November 3, 1980.

At the time all the acts alleged in the indictment occurred, Lentz was a private citizen, residing in Burnet County, Texas. (R. 185, 209). On March 9, 1979, he

was approached by three law enforcement officers, (R. 199, 201, 209, 211) two of whom he knew and trusted, and was asked to assist in wiretapping a phone. (R. 184, 189, 193, 194). In being asked to participate in a wiretap scheme, Lentz was told lies by these men about the existence of a large scale drug smuggling operation at the home of Patricia Maddox in Burnet County, Texas. (R. 184, 189, 224, 500, 535).

The three men who approached Lentz were the Sheriff of Burnet County, R. C. Hullum, the Chief Deputy Sheriff of Burnet County, Jack Hall, and a member of the Greater Austin Area Organized Crime Unit [hereinafter referred to as OCU], William Fargo. (R. 184, 191, 197). These three men knew that Lentz had previously been willing to assist law enforcement officials when he was asked to do so, and further that approximately two weeks prior to March 9, 1979, Lentz had assisted the OCU and United States Secret Service in developing a case in a $100,000.00 counterfeiting operation. (R. 144, 187, 293, 574, 644, 713, 766, 934).

The undisputed evidence indicated that Lentz had never heard of any scheme to wiretap the phone of Patricia Maddox until he was asked for assistance by Hullum, Hall and Fargo. (R. 364, 529, 537, 935). It is undisputed that at the time Lentz was asked to participate, Hullum, Hall and Fargo were acting in their official capacity as law enforcement officers. (R. 209, 212,

338, 339). It is undisputed that when Lentz was approached, the scheme to attempt to intercept wire communications had already been created and had originated from either Hall or Hullum on or before March 8, 1979. (R. 213, 260, 364, 529, 566, 581). It is further undisputed that Lentz would not have participated in the scheme unless he had been asked by Hullum. (R. 853, 884, 939, 940).

Lentz was convicted by a jury, and his conviction has been affirmed even though the Court of Appeals in its opinion "question[ed] the *wisdom* of the prosecutor's decision to bring charges against Lentz". Lentz was required to be tried at the same trial as one of the law enforcement officers who requested his assistance, and the Government repeatedly referred to "burglaries" throughout the trial and in its arguments, although there was no evidence of such an offense. Further, Lentz has been convicted after the Government was allowed to go to trial on a four count indictment, when two counts were patently frivolous. Nevertheless, the Court of Appeals has allowed the conviction to stand, in spite of its questioning the Government's wisdom of proceeding against Lentz; in spite of its opinion that the Government's proof of an essential element of the offense was "thin" and "skimpy"; and in spite of the record indicating Lentz's only motive for his participation in the events leading to his arrest was to help law enforcement in Burnet County. (R. 184, 230, 231, 750, 766, 936, 937).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals For The Fifth Circuit Has Rendered A Decision In Conflict With The Court Of Appeals For The Sixth Circuit.

Lentz was convicted for endeavoring to intercept wire communications made and sent by persons calling to and from a telephone at the residence of Patricia Maddox just outside the town of Burnet, Texas. The conviction of Lentz was affirmed by the Court of Appeals for the Fifth Circuit, but in reviewing the same legal issue regarding "common carrier" the Court of Appeals for the Sixth Circuit had previously rendered a decision which conflicts with the decision of the Fifth Circuit in this case. The charges involve a violation of 18 U.S.C. §2511(1)(a).

To fall within the proscription of the statute in this case the wire communication must be one that is

> furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign commerce

18 U.S.C. §2510(1). In the week long trial of this case there were only two references of any nature regarding the status of the wire communication that the law enforcement officers and Lentz attempted to inter-

cept. Once during a tape recorded conversation that was admitted in evidence, Hall mentioned that the phone system in the area was ". . . Continental; one step below General." (Govt. Ex. 30B). The only other testimony was from a witness who gave her phone number with an area code and testified that she was on the same party line as the phone which was supposed to have been tapped. (R. 633, 634). This evidence, which the Court of Appeals called "thin", was the Government's entire amount of proof in over 1000 pages of testimony about an essential element which the Government supposedly had the burden to prove beyond a reasonable doubt. The Government made no attempt whatsoever during its case to prove that the wire communication in question was furnished by a common carrier, as defined by 18 U.S.C. §2510(10) and 47 U.S.C. §153(h). That a witness had a phone number with an area code was not "proved" by the Government. It was a mere accident that Lillian Wall in an unresponsive answer to a Government question stated that her phone number included an area code.[1] (R. 633). The same is true about the conversation between Hall and Fargo in which "Continental" was mentioned as the phone system in Burnet County, Texas.

In a criminal case

> [i]t is a cardinal rule that no person should be subjected to punishment unless the evi-

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1 Q. And, do you have a telephone ma'am?
A. Yes. Area Code 512-756-4028.

> dence shows beyond a reasonable doubt the existence of *every fact* necessary to constitute the crime charged.

United States v. White, 569 F.2d 263, 268 (5th Cir. 1978), *cert. denied*, ____ U.S. ____ (1979). The Fifth Circuit in this case totally ignored the lengthy and well reasoned discussion of the necessity and method of showing the common carrier status of a wire communication in a case in the Sixth Circuit involving the same statute. *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978). *See also United States v. Blattel*, 340 F.Supp. 1140 (N.D. Iowa 1972). *Cf. United States v. Burroughs*, 564 F.2d 1111 (4th Cir. 1977). The only thing the panel mentioned about two of these cases was the length of time it took the Government to request that judicial notice be taken of the common carrier status of the phone companies in question.

In *Jones*, there was proof that the phone in question was furnished by South Central Bell Telephone Company, and this evidence was held insufficient to prove that South Central Bell was a common carrier providing facilities for the transmission of interstate communications. There as here the Government argued that Bell's status could be inferred as a "fact within the common knowledge of the jury." *Id.* at 222. The Court held that Bell's status as a "common carrier . . . providing . . . facilities for the transmission of interstate . . . communication" is a fact which, if to be established

without direct or circumstantial proof, must be governed by the judicial notice provisions of the Federal Rules of Evidence. *Id.* at 222, 223.

Here the Government made no effort through direct or circumstantial evidence to show the common carrier status, if any, of "Continental" before resting its case. Only *after* the Government rested and Lentz moved for a judgment of acquittal did the Government request that the trial court take judicial notice "that a telephone communication is an interstate — it's a device capable of carrying interstate communications". (R. 795). The court took judicial notice of nothing in the record. If judicial notice can somehow be taken implicitly, it was not done here in accordance with Rule 201(g) of the Federal Rules of Evidence. *United States v. Jones, supra* at 223, 224.

If Continental was a common carrier, the Government should have been required to prove it by direct evidence.

> Inferences from established facts are accepted methods of proof when no direct evidence is available. It is essential, however, that there be a logical and convincing connection between the facts established and the conclusion inferred.

United States v. Bycer, 593 F.2d 549, 550 (3d Cir. 1979). The only "proof" in the Government's case against

Lentz about Continental is that it is one step below General. The "proof" also shows that the phone system in Burnet County is a little more obsolete than the phone system in Austin. There is *no evidence* that the phone belonging to Mary Gail Knight which Lentz attempted to tap was in any way connected to Continental. There is *no evidence* that the phone to be tapped was even in working order, much less capable of an interstate communication. (R. 612-632). Furthermore, there is *no evidence* that the phone to be tapped had an area code. (R. 613-632).

The Fifth Circuit distinguished *Jones* and *Blattel* by stating that

> [h]ere the government proved a vital fact: the number of the telephone *at issue* included an area code.

[Emphasis added]. This "vital fact" from which the panel allowed an inference of an essential element of the offense to be drawn is simply not correct. Lillian Wall testified that *her* phone number included an area code. Lentz was charged with attempting[2] to intercept a wire communication from the home of Patricia Maddox, Mary Gail Knight's former roommate. Mary Gail Knight apparently was on the same four-party line as Lillian Wall, but there is no proof anywhere that either

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2 No actual interception of *any* communication occurred in this case, other than the Government's interception of Lentz's oral conversations. (R. 158, 225, 562).

woman was connected to Continental or that Continental furnished communications in interstate commerce.

The Court of Appeals cited *United States v. Barrera*, 547 F.2d 1250 (5th Cir. 1977) in stating that it was proper for the jury to determine whether the evidence regarding the wire communication was sufficient. More appropriately, the Court of Appeals should have quoted *Barrera* in this regard:

> *Glasser* . . . requires us to examine the evidence in the light most favorable to the Government in reviewing a jury verdict, but it does not compel judicial abdication to the findings of the trier of fact.

Id. at 1255. In this case the jury "*must* have had a reasonable doubt as to the existence [of one] of the essential elements of the crime charged," the common carrier. *Id.* at 1255. Lentz's motion for judgment of acquittal should have been granted, and his conviction should have been reversed. *See also United States v. Gandolfo*, 577 F.2d 955 (5th Cir. 1978); *United States v. Haggins*, 545 F.2d 1009 (5th Cir. 1977); *United States v. Marable*, 574 F.2d 224 (5th Cir. 1978).

Since the Fifth Circuit and the Sixth Circuit are in conflict regarding the method of proving the status of a common carrier in order to sustain a conviction under 18 U.S.C. §2511(1)(a), this Court should grant this

petition in order to review this case and to set forth guidelines for lower courts in cases involving wire interceptions and in the applicability of Rule 201 of the Federal Rules of Evidence.

II. The Court Of Appeals Decided A Federal Question Regarding Entrapment Contrary To Applicable Decisions Of This Court, Since The Undisputed Evidence Should Have Indicated That Lentz Was Entrapped As A Matter Of Law.

This Court has held that entrapment occurs

> when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Sorrells v. United States, 287 U.S. 435, 442 (1932). This has been the law of entrapment for approximately 50 years. The Court of Appeals in this case agreed that "Lentz was induced by government agents to participate in the wiretapping scheme", and apparently agreed that "the entire plan was conceived by law enforcement officers". With these two conclusions alone, the panel should have held that as a matter of law Lentz was entrapped. Yet the Court of Appeals held that even if the Government created the crime and in-

duced Lentz to participate, Lentz was not entrapped if the jury found he was a "willing, knowing, voluntary participant in an illegal scheme. . . ." The Fifth Circuit's analysis of the law of entrapment is incorrect. Since the wiretap scheme was created by the law enforcement officials who induced Lentz to participate, the case should not have been submitted to the jury.

In reversing a conviction in *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973), the Court stated

> [t]he facts of this case clearly fit within the framework of the law in this field. If Defendant is to be believed, the sales of heroin were made through the creative activity of the government. The Defendant would not have had the heroin to sell if it had not been purchased by the Informer. . . .

Id. at 906. Although *Bueno* may not be applicable to fact situations involving illegal drug transactions after *Hampton v. United States*, 425 U.S. 484 (1976), the legal principles are still sound and are applicable here. Paraphrasing, if the *Government's witnesses* are to be believed, the scheme to wiretap was made through the creative activity of the government.[3] Lentz would not

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3 Government involvement for purpose of entrapment means "involvement of federal, state, or local law enforcement officials or their agents." *United States v. Perl*, 584 F.2d 1316, 1321 n.3 (4th Cir. 1978). It is therefore immaterial in analyzing Lentz's case that Hullum is a codefendant, especially since the subjective test of predisposition is applied.

have had any idea of the scheme, much less the predisposition to wiretap, if he had not been approached by the three law enforcement officers.

In analyzing the defense of entrapment, courts rely primarily on *Sorrells v. United States, supra.*[4] In *Sorrells,* an undercover prohibition agent, while telling war stories, asked the defendant several times to obtain illegal liquor for him. On the third request the defendant obtained a half gallon of liquor for the government agent and was subsequently prosecuted for violating prohibition laws.

This Court stated, as did the Court of Appeals here, that if the Government merely affords the opportunity or facility for the commission of an offense, the prosecution is not defeated. The Court noted, however, that

> [a] different question is presented *when the criminal design originates with the officials of the government,* and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Id. at 442 [Emphasis added]. After analyzing the decisions and reasoning of other courts, the Court concluded that entrapment was a valid defense since Con-

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4 See *Hampton v. United States, supra; United States v. Russell,* 411 U.S. 423 (1973); *Sherman v. United States,* 356 U.S. 369 (1958).

gress did not intend for the statute prohibiting the sale of liquor to be abused by the Government by inducing innocent persons to break the law. The Court also concluded that

> [t]he predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the *controlling question* whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the *creative activity of its own officials.*

Id. at 451 [Emphasis added]. Thus, if an illegal scheme is wholly created by the Government and a defendant is induced by the Government into participating in the scheme, the fact that he knowingly or willfully participated in the scheme does not show that he was not entrapped.

Just as this Court held in following *Sorrells* in *Sherman v. United States, supra,* this Court should review this case and should hold from the testimony of the Government's own witnesses that Lentz was entrapped as a matter of law. In *Sherman* the defendant was convicted of selling narcotics to a Government informant. This Court held that the defendant's conviction should be reversed despite two prior convictions for sale and possession of narcotics, and despite the fact that the jury must have concluded that the defendant knowingly

and willfully sold the narcotics in question. The Court relied heavily on *Sorrells,* and in doing so focused on the Government's creative activity in the offense and inducement of the defendant by the Government or its agents.

In this case it is *undisputed* that before Lentz was approached regarding the offense in question, the scheme to wiretap had already been created and designed by either Hullum or Hall. (R. 213, 260, 364, 529, 566, 569, 581). It is *undisputed* from the testimony of all the witnesses that Lentz had never heard of the scheme to wiretap the phone at the residence of Patricia Maddox until March 9, 1979. (R. 212, 213, 935). It is *undisputed* that the three persons who induced Lentz to participate were Hullum, the Sheriff of Burnet County; Hall, his Chief Deputy; and Fargo, a member of the OCU. (R. 184, 197). And it is *undisputed* that Lentz would not have participated in any of these activities unless he had been asked to do so by Hullum. (R. 853, 884, 939, 940). Indeed, Hall even referred to the request by Hullum as an "order". (R. 114). These undisputed facts should put Lentz in the position of a "sub-agent of, and conduit for, the government's provocator [Hullum or Hall], and because, acting for the government, he was not guilty of any offense. . . ." *Henderson v. United States,* 261 F.2d 909, 912 (5th Cir. 1958). *Cf. Williamson v. United States,* 311 F.2d 441 (5th Cir. 1962). *See also Tzimopoulos v. United States,* 554 F.2d 1216 (1st Cir. 1977), *cert. denied,* 434 U.S. 851 (1977); *United States v. Shaw,* 570 F.2d 770 (8th Cir. 1978).

As in *Sherman* and *Henderson* Lentz was entrapped as a matter of law. Two primary factual distinctions make this case and the reasons for review and reversal far stronger than *Hampton v. United States, supra* and *United States v. Russell, supra* where the Supreme Court upheld the jury's verdict of guilt. First, and more importantly, the defendant in *Hampton* had conceded predisposition, and there was more than substantial evidence in *Russell* that the defendant had previously committed the same kind of offenses as that for which he was on trial.[5] Second, *Hampton* and *Russell* involved drug-related offenses where it was necessary that the law enforcement officers pose as private individuals involved in illicit drug trafficking. The law enforcement officers that induced Lentz were not undercover; they were openly and visibly acting as the Sheriff, the Chief Deputy Sheriff, and an OCU member. Furthermore, Lentz has never conceded predisposition, but instead he has strongly denied it throughout the trial and on appeal.

Assuming these facts somehow were sufficient to go to the jury, there was wholly insufficient evidence to prove that Lentz had any predisposition to commit any acts alleged in the indictment. The Fifth Circuit disagreed and concluded that there was a great deal of evidence from which the jury could have found Lentz's

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5 See *Hampton v. United States, supra* at 487 n.3; *United States v. Russell, supra* at 428, 432, 437.

predisposition.[6] Lentz does not deny that all the acts shown in the transcripts of recorded conversations occurred, nor does he deny his participation in the attempted wiretap scheme. By his plea of not guilty, however, he strongly denied that he was *predisposed* to participate in the wiretap endeavor, and by this petition he strongly urges that the evidence was patently insufficient to show beyond a reasonable doubt that he was predisposed.

Although *Glasser v. United States*, 315 U.S. 60 (1942) requires this Court to examine the evidence in the light most favorable to the Government, "it does not compel judicial abdication to the findings of the trier of fact." *United States v. Barrera*, 547 F.2d 1250, 1255 (5th Cir. 1977). *All* the acts or events relied on by the Court of Appeals to show Lentz's predisposition are acts which took place *after* the wiretap plan was created by the law enforcement officials and *after* Lentz had been induced to participate in the attempted wiretap. The evidence shows that Lentz knowingly and willfully participated in an illegal attempt to wiretap a phone, but it totally

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6 The panel pointed to Lentz's statements that he knew the transaction was illegal, his willingness to continue the attempted wiretap, his volunteering to provide Hullum with eavesdropping devices, his exculpatory stories told persons from whom he borrowed equipment, and his readiness to take all the blame for the law enforcement officers in the event of detection.

fails to show that he was predisposed[7] to participate in such an attempt.

Under the plain meaning of predisposition the acts and evidence relied on by the Court of Appeals *after* Lentz was induced to participate show nothing regarding a prior inclination by Lentz to attempt to wiretap the Maddox home. If the holding of the Fifth Circuit that acts showing willfulness, knowledge, intent and voluntariness, i.e., the same acts to show the commission of an offense, can be sufficient to show predisposition beyond a reasonable doubt, then there will be no defense of entrapment. This is especially true in this case, when all these acts occurred after Lentz had been induced to participate in an illegal scheme concocted by law enforcement officials.

The conclusion of the Court of Appeals that the evidence is sufficient to support the jury's verdict that Lentz was predisposed to participate is in error not only because the wrong evidence was used to support the conclusion, but also because there is no evidence to show Lentz's predisposition to commit the specific

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7 *Webster's Third New International Dictionary of the English Language Unabridged* (1976) at p. 1786 defines "predisposed" as: "having a predisposition: INCLINED, SUSCEPTIBLE, TENDING . . ." arranged or settled in advance." Webster's further defines "predispose" as: "to dispose in advance: make susceptible: INCLINE: to bring about susceptibility." *The Random House Dictionary of the English Language* (1979) at p. 1133 defines "predispose" as: "to give an inclination or tendency to beforehand . . .; to give or furnish a tendency or inclination."

offense in question. Assuming that the "controlling question" is no longer whether the offense is "the product of the creative activity of its own officials," *Sorrells, supra* at 451, the Government must still prove beyond a reasonable doubt that "the accused [was] ready and willing without persuasion and [was] awaiting any propitious opportunity to commit *the offense.*" *United States v. Wolffs*, 594 F.2d 77, 80 (5th Cir. 1979). [Emphasis added].

By *the offense* the Government must prove that Lentz, without inducement, was predisposed to commit *the offense for which he was charged.* The Government did not and could not have produced any evidence to show that Lentz had the prior inclination to attempt to wiretap the phone of Patricia Maddox because Lentz had never heard of the scheme until after he was approached by the law enforcement officers and asked to participate in a plan they had created. (R. 212, 213, 364, 569). In examining the sufficiency of the evidence on appeal

> the legal test is whether a jury could conclude that the evidence and its inferences are inconsistent with every reasonable hypothesis of innocence.

United States v. Barresi, 601 F.2d 193, 195 (5th Cir. 1979). In an entrapment case the question must be whether a reasonably minded jury must have necessarily had a reasonable doubt regarding predisposition. *See United States v. Barrera, supra.*

Lentz, who never testified, is presumed innocent, and therefore, it is presumed that he was not predisposed to engage in the attempted illegal wiretapping of the Maddox residence. The Government's evidence and the evidence relied on by the Fifth Circuit to show Lentz's predisposition is merely the evidence indicating what Lentz did after he was induced to participate in the wiretap scheme. Since the only evidence in the record regarding Lentz's predisposition, shows only that he was ready and willing to assist Burnet County and other law enforcement officers,[8] this Court should grant this petition and hold that the jury must have had a reasonable doubt regarding Lentz's predisposition.

III. The Court Of Appeals For The Fifth Circuit Decided An Important Question Of Federal Constitutional Law Arising From Non-contraband Entrapment Cases Which Should Be Decided By This Court.

The majority of this Court participating in *Hampton v. United States, supra,* agreed either with the dissent in *Russell* and the concurring opinions in *Sherman* and *Sorrells* or with majority in *Russell* that

> we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process

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8 (R. 184, 230, 231, 750, 766, 936, 937).

> principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

United States v. Russell, supra at 431, 432. Other courts have also agreed that outrageous police conduct may bar prosecution of private citizens. *See United States v. Till,* 609 F.2d 228 (5th Cir. 1980); *United States v. Twigg,* 588 F.2d 373 (3rd Cir. 1978); *Greene v. United States,* 454 F.2d 783 (9th Cir. 1971); *See also United States v. Archer,* 486 F.2d 670 (2d Cir. 1973).

The conduct of the law enforcement officers in this case was outrageous. To allow Lentz to be convicted and incarcerated under the facts of this case "is offensive to the common and fundamental ideas of fairness and right. . . ." *Betts v. Brady,* 316 U.S. 455, 473 (1942). *Cf. Miranda v. Arizona,* 384 U.S. 436 (1966); *Mapp v. Ohio,* 367 U.S. 643 (1961); *Weeks v. United States,* 232 U.S. 383 (1914).

The Fifth Circuit in its opinion questions "the *wisdom* of the prosecutor's decision to bring charges against Lentz. . . ." The Court of Appeals in paraphrasing Oscar Wilde further observed "that if this is the way Burnet County treats its confidential informants, it doesn't deserve to have any." Nevertheless, the Court found that the prosecution, and implicitly the conviction and incarceration of Lentz were not fundamentally unfair. While the quoted language may mean something to the Government in future similar cases,

it will be of little comfort to Lentz during his six months of imprisonment. Furthermore, the Court of Appeals apparently never fully grasped the facts of this case.

Burnet County was not treating Lentz or any confidential informant in any way whatsoever in this case. Lentz was arrested by the FBI, and the plaintiff in this case is the United States of America. The "prosecutor" whose wisdom is questioned is not a state official in Burnet County, but rather is the United States Attorney for the Western District of Texas. Additionally, Lentz was never a *confidential* informant for Burnet County or any other agency, regardless of such a description by one of the Government's witnesses. It takes a considerable amount of time to digest the record in this case, but if one fact in the record is clear, it is that Lentz's assistance given to the law enforcement officers of his home county was anything but confidential.

In making this due process attack on his conviction, Lentz has been most unfortunate to be joined by Hullum. It was even more unfortunate when the Fifth Circuit incorrectly lumped Lentz and Hullum together in analyzing the due process argument. In looking at the record in any case "it is necessary . . . that [the Court] undertake to isolate the evidence against each defendant." *United States v. Gandolfo, supra.* This Court should similarly isolate each defendant in reviewing the legal arguments presented. Lentz has been plagued

from the beginning when he was forced over his objections to be tried with Hullum.[9] Then the Court of Appeals in its combined analysis of the due process issues of Lentz and Hullum stated that to find Lentz's prosecution fundamentally unfair "would be tantamount to giving *police* everywhere carte blanche to ignore laws . . . ." [Emphasis added].

Hullum is one of the law enforcement officers whose conduct Lentz has repeatedly argued was outrageous. Lentz has no quarrel with the Fifth Circuit's statement that "it could hardly shock anyone's conscience to see an elected law enforcement official prosecuted for willfully and knowingly breaking a law . . . ." This is precisely the reason Lentz should have been granted a separate trial.

Unquestionably, Lentz's case does not present the repugnant physical abuse found to be shocking to the conscience in *Rochin v. California*, 342 U.S. 165 (1952). The Court of Appeals in holding that the conduct of the law enforcement officers in this case was not too outrageous compared only the *facts* in Lentz's case to those in *Rochin*. The principles stated in *Rochin*, not merely the facts, are what should be applied here to demonstrate the fundamental unfairness of Lentz's prosecution, for as Mr. Justice Frankfurter wrote

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9 Lentz's motion for a separate trial was denied by the trial court and this decision was affirmed by the Court of Appeals. The charge to the jury on entrapment additionally placed Lentz right with Hullum. See Court of Appeals Opinion, n.8.

> [d]ue process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice".

Rochin v. California, supra at 173.

Allowing Lentz to be prosecuted after the conduct of the law enforcement officers in this case should offend anyone's sense of justice. Lentz, a private citizen, was approached on March 9, 1979, by Hullum, the Sheriff, Hall, the Chief Deputy Sheriff, and Fargo, an OCU member. In asking Lentz to assist in the already planned wiretap, all three law enforcement officers purposely lied to him and deceived him, stating that his assistance was needed to break up a large scale drug smuggling operation at the house to be wiretapped. (R. 185-90, 193, 207-09, 534-36, 834-36). He was told by these three men: "we need a favor" and "we feel like you are the person that can do it." (R. 211). All three law enforcement officers were aware that approximately two weeks prior to March 9, 1979, Lentz had played a major role in assisting the OCU and the U.S. Secret Service in obtaining the arrests of persons involved in a $100,000.00 counterfeiting scheme in Burnet County. (R. 187, 293, 574, 934). Yet, all three officers of the law lied to him, deceived him, induced him to trust them, and moreover, *participated with him in every act* alleged in the indictment.

One of Mr. Justice Powell's reasons for leaving open a due process attack on a conviction regardless of predisposition was that the Supreme Court had not

> had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses.

Hampton v. United States, supra at 493. Lentz's case is not a case involving contraband, other than the lies he was told about it in order to encourage his assistance. This case is probably the only case to be found where a private citizen has been asked to participate in an illegal scheme already conceived by the law enforcement officers and where the law enforcement officers were acting in their official capacity. In this case the distinction lies in the fact that the persons who arrested Lentz were not undercover agents stealthily infiltrating a drug ring. They were a Sheriff and his deputies, persons who Lentz trusted and truly believed were trying to combat a large scale drug smuggling operation. Fargo and Hall only disguised one thing when they approached Lentz — their intention to arrest him.

Illegal wiretapping is by no means a less severe offense than contraband offenses, but the due process clause requires that this Court examine the whole course of events surrounding the proceedings "even toward those charged with the most heinous offenses" in determining whether the proceedings were fundamentally fair. *Rochin v. California, supra* at 169.

The conduct of the law enforcement officers in this case can be nothing less than outrageous. The Court of Appeals noted that the Government was allowed to proceed to trial with a multiplicitous indictment containing a variance from the proof. Also, Lentz was forced to be tried with Hullum. Moreover, Count four of the indictment was patently frivolous. *See United States v. Schweih*, 569 F.2d 965 (5th Cir. 1978). Focusing solely on the conduct of the law enforcement officers, this Court should grant this petition and should find the prosecution of Lentz fundamentally unfair. When the proceeding is examined as a whole, the argument for unfairness is even more compelling.

IV. The Court Of Appeals For The Fifth Circuit Decided A Federal Question Regarding The Jury Charge On General Intent In Conflict With This Court's Decision In *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The District Court in the charge to the jury stated that it was reasonable for the jury "to infer that a person ordinarily intends the natural and probable consequences of his knowing acts." (R. 1137). This charge improperly shifted the burden of showing a lack of intent to Lentz. *See Sandstrom v. Montana*, 442 U.S. 510 (1979); *Tyler v. Phelps*, 622 F.2d 172 (5th Cir. 1980). This is especially true in Lentz's case since the offenses for which he was charged required specific intent. *See United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977). In view

of the decision of this court in *Sandstrom*, the Court should examine the Fifth Circuit's decision in *United States v. Chiantese, supra*, and determine for the benefit of all lower courts whether there is any real difference to a jury between "it is reasonable to infer" and "the law presumes", as those phrases are used in jury instructions on intent.

CONCLUSION

For the foregoing reasons, Petitioner William Lawrence Lentz respectfully submits that his petition for writ of certiorari should be granted in order for this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ATTORNEY OF RECORD
FOR PETITIONER
WILLIAM LAWRENCE LENTZ

CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the foregoing instrument have been served on Mr. Wade Hampton McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530; one true and correct copy on Mr. Jamie C. Boyd, United States Attorney, 655 E. Durango Blvd., San Antonio, Texas 78205; and one true and correct copy on Mr. J. P. Darrouzet, attorney for R. C. Hullum, Jr., 812 San Antonio, Austin, Texas, 78701, by United States Mail, postage pre-paid, on the ____ day of December, 1980.

CHARLES O. GRIGSON

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

versus

William Lawrence LENTZ and
Raymond Clinton Hullum, Jr.,
Defendants-Appellants.

No. 79-5418.

United States Court of Appeals,
Fifth Circuit.

Aug. 25, 1980.

Appeals from the United States District Court for the Western District of Texas.

Before AINSWORTH and GEE, Circuit Judges, and HUNTER*, District Judge.

GEE, Circuit Judge:

In this somewhat bizarre case, a former sheriff of Burnet County, Texas, R. C. Hullum, one of his for-

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* District Judge of the Western District of Louisiana, sitting by designation.

mer deputies, Charles Johnston,[1] and a civilian who had cooperated with law enforcement officers in the past, William Lentz, were indicted for illegal wiretapping.[2] The trial court granted motions for acquittal on count four, but Lentz and Hullum were convicted by a jury of the remaining three counts of the indictment. The government elected to proceed to sentencing on the conspiracy conviction and only one substantive offense as to each defendant. Hullum was sentenced to concurrent sentences of one year imprisonment on each of the two counts, with the court ordering that he be released as if on parole after serving nine months. Lentz received the same concurrent terms of imprisonment and was ordered to be released as if on parole after serving six months. They now appeal to this court, and we affirm.

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1 Johnson plead guilty and testified for the government at trial. He is not a party to this appeal.

2 Specifically, count one of the indictment charged them with conspiracy to intercept wire communications in violation of 18 U.S.C. §§371, 2511(1)(a); count two charged Hullum with the completed, substantive offense of intercepting, endeavoring to intercept, and procuring the interception of wire communications in violation of 18 U.S.C. §2511(1)(a) and charged Lentz and Johnston with aiding and abetting Hullum; count three charged Lentz with the completed offense and Hullum and Johnston with aiding and abetting; count four indicted Lentz for possession of a device for use in the surreptitious interception of communications in violation of 18 U.S.C. §2512(1)(b) and charged Hullum with aiding and abetting in the last-mentioned violation.

Factual Background

Sometime in mid-February 1979, Hullum, who was then the duly elected sheriff of Burnet County, discussed with his chief deputy, Jack Hall, Hullum's interest in curtailing illegal drug traffic in the county and his belief that a house on Mormon Mill Road was occupied by two women[3] who were involved in that traffic. Hall testified that a search warrant had been executed on the house the preceding August, yielding a little marijuana, but that he knew of no intelligence information on any drug operation there in February 1979. According to Hall, Hullum suggested that a phone tap be made on the Maddox residence's line. Both men seemed aware that the proposed tap would be illegal.

At about this same time, Sheriff Hullum also suspected that another residence in the county, this one in the Granite Shoals area and wholly unconnected with the drug traffic problem, was a repository for stolen property. Hall testified that he explained to Hullum that it would take time to get a confidential informant within the stolen goods ring to work undercover for the sheriff's office. At that point, Hullum asked Hall to

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3 Hullum believed that Patricia Maddox and another woman lived in the house during the events in question; testimony at trial, however, showed that although Maddox had lived there, she had moved out before February 1979. Nevertheless, the house was often referred to as the "Maddox residence" in the trial testimony, and we will use that terminology here. *See also* our discussion of the indictment, infra.

break into the house to obtain serial numbers from the stolen property so that a search warrant could be executed and suggested that Hall enlist the assistance of William Lentz, a civilian who had previously served in a confidential informant capacity for law enforcement officers.[4] Evidently Hullum repeated his request for a break-in several times over the next few days.

Deputy William Fargo was Burnet County's representative on the Organized Crime Unit[5] and spent much of his time in Austin. Hall discussed with Fargo the sheriff's plans to wiretap the house on Mormon Hill Road and to break into the house at Granite Shoals. Fargo in turn talked to Lieutenant Bobby Simpson of the Austin Police Department, the head of the Organized Crime Unit, and Special Agent Robert Hogland of the Federal Bureau of Investigation. A few days later, Hall met with Simpson, Hogland, and Fargo in Austin, at which time Hall told the men of Hullum's ideas. Simpson provided Fargo and Hall with recording equipment to wear during their conversations with Hullum. Later the FBI provided Fargo with a more compact recording unit than that provided by Simpson.

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4 In the winter of 1978-79, Lentz had worked uncercover at the behest of the Organized Crime Unit, a task force composed of law enforcement officers from six contiguous counties and headed by the Austin Police Department, and had helped to break up a counterfeiting ring in early February 1979.

5 *See* n.4, *supra*.

The next day, March 8, Hullum, Hall, and Fargo met out in the countryside at a roadside rest area. Hall wore a microphone that Simpson had given him; the receiver and a recorder were in the trunk of Fargo's car. Hall asked Hullum if he still wanted to tap the telephone line from the Maddox residence, and Hullum answered in the affirmative, stating that his informant was a person who shared a party line with Maddox and that the tap would be the only effective way to discover the activities of the smuggling operation. Hullum suggested that Lentz be brought in to do the actual tapping and that he also be approached about the break-in at the Granite Shoals residence.

In the evening of the following day, Hullum, Hall, and Fargo, joined by Lentz, met at Bear Creek Cemetery in Burnet County. Hall again wore a microphone to tape the conversation. During this meeting Hullum told Lentz that he was about to discuss with him the most serious thing he had ever been involved in and that they could be in serious trouble if it were not handled correctly. Hullum then asked Lentz to tap the Maddox telephone line. Lentz evidently was enthusiastic about the operation and agreed to the wiretap; he explained that his primary problem would be finding a spot from which he could set up and tap the line and volunteered to get any needed equipment from a friend, at which point Hullum again reminded him that the operation was illegal. Hullum also stressed to Lentz the fact that if anyone were caught, he would be doing "federal time." Nevertheless, Lentz was undeterred; he

even indicated that he would be willing to take the blame alone should the illegal activity be uncovered.

Hullum left this meeting briefly to get some equipment that Lentz might be able to use.[6] While he was gone, Fargo and Hall explained the break-in operation at Granite Shoals to Lentz, who seemed willing to undertake that task, also, and discussed various ways to get into the house undetected.

Another meeting was held at Bear Creek Cemetery four nights later. The same participants were present as at the previous meeting there, with the addition of Deputy Johnston. This time Deputy Fargo wore recording equipment provided by the FBI. Lentz told the others that he had obtained the proper equipment with which to tap the line, and he and Hullum discussed the details and location of the tap. Finally, a site near the Maddox house that was hidden from the road during the day was selected. Hullum and Lentz again discussed the illegality of the operation, and Lentz repeated his offer to take all the blame if they were caught. The break-in operation at Granite Shoals was also discussed briefly. Lentz and Johnston left the meeting together to pick up the pole-climbing equipment that Lentz had borrowed from a friend, to whom he had explained that he needed it to hang a night light from a pole. The five men reassembled at the prospective

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6 The equipment with which Hullum returned was rejected by Lentz as obsolete; he stated that he could obtain better equipment, perhaps by the next day.

wiretap site and, after looking around, decided to meet in the sheriff's office the next morning to make final plans.

At that morning meeting, Deputy Fargo again wore a microphone and recording equipment. The plans as finally made called for Hall and Lentz to drive with Fargo to the wiretap site in a borrowed truck. Hall volunteered to carry some of the wiretap equipment for Lentz, and Fargo served as their lookout. After Lentz climbed the pole, he or Hall was to radio Johnson, so that the latter could make radio contact with Sheriff Hullum, who had driven to a location near the Maddox residence. Sheriff Hullum then was to go to the residence of his informant, who shared a party line with Maddox, and make a phone call to the sheriff's office, keeping the party line open to enable Lentz to find it and tap into it. All went according to plan for a time, but once atop the pole, Lentz attempted for 15 or 20 minutes to find the right line to no avail. He notified Deputy Hall of this, and Hall walked to the truck and told Fargo. Fargo drove about a mile to the other side of the Maddox residence, found Hullum, and told him of the problem. After Hullum discussed and then rejected the possibility of using someone else to do the wiretap, Hullum told Fargo to direct Lentz to try again for about a half hour to tap the line and, if unsuccessful, to stop and return to the sheriff's office. When Fargo returned to the tap site, he had some difficulty locating Hall and Lentz; after he found them, he told them to

break off work. The men all returned to the sheriff's office, and shortly thereafter, Lentz and Sheriff Hullum were arrested.

Sufficiency of the Evidence

As one of the elements of the government's case under 18 U.S.C. §2511(1)(a), it had to prove that the telephone conversations at issue were "wire communications," which are defined in 18 U.S.C. §2510.[7] Both defendants contend that the government's evidence was insufficient to show that the wire communication in this case was furnished by a common carrier.

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7 Title 18 of the United States Code provides, in pertinent part:

§2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

. . . . .

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications . . . .

Defendants carry a heavy burden here, since the evidence must be considered in the light most favorable to the verdict, and we must draw all reasonable inferences and decide credibility choices in favor of the jury's decision. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Hitsman*, 604 F.2d 443 (5th Cir. 1979). The government introduced testimony by Mary Gail Knight, who lived in the Maddox residence during the attempted wiretap, indicating that her telephone number was 756-4478 and that the telephone line was a four-party line. Mrs. Wall, from whose residence Sheriff Hullum placed the call to the sheriff's office to keep the line open, testified that her phone number was "area code 512-756-4028" and that she was on the same party line with Mrs. Knight. A tape recording clandestinely made by Hall of a meeting at which Hullum and Lentz planned the eavesdropping operation was played before the jury; the recording contains the following conversation:

> HALL:
>
> Our phone system out here is a little more obsolete than what they have in Austin, too; I don't know if you can do that on a party line. Some of this phone system is some kind of mess. . . .
>
> FARGO:
>
> This is General Telephone, too.
>
> HALL:
>
> No, this is Continental; one step below General.

After the government rested its case, Lentz and Hullum moved for judgments of acquittal. At that point the government requested the court to take judicial notice of the interstate nature of the telephone communications, but there is no indication in the record that the trial judge did so. However, the court obviously felt that the foregoing evidence was sufficient to submit the issue of whether the conversation at issue was a "wire communication" to the jury. That is, he obviously believed that a reasonable minded jury would not necessarily entertain a reasonable doubt as to the existence of this essential element. *See United States v. Barrera*, 547 F.2d 1250, 1255 (5th Cir. 1977).

While the evidence of the common carrier status of the company providing the telephone at issue was thin, and while we do not congratulate the government for its skimpy proof of this element, we think that the evidence presented passes muster. From the testimony, the jury could have concluded, based on the common fund of information supposedly possessed by jurors, that the assignment of an area code to a number indicates that the telephone in question is capable of being utilized in interstate telephone calls and that the telephone was not merely part of a private intercom system.

Defendants point out that in *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978), the government proved only that the telephone at issue was furnished by South Central Bell Telephone Company and that the court re-

fused to allow the jury to use its common experience to draw the inference that the telephone was furnished by a common carrier. Rather, the Sixth Circuit ruled that South Central Bell's status as a common carrier, under the facts presented in *Jones*, must be governed by the judicial notice provisions of the Federal Rules of Evidence. *Id.* at 222-23. Since the government in *Jones* did not move the court to take judicial notice at trial, the Sixth Circuit reversed Jones' conviction. Defendant also relies on *United States v. Blattel*, 340 F.Supp. 1140 (N.D. Iowa 1972), in which the government merely proved that the telephone was provided by Northwestern Bell Telephone Company and moved the court, unsuccessfully, to take judicial notice of Northwestern Bell's common carrier status 17 days after the jury's verdict.

We think the facts introduced by the government in the instant case distinguish it from *Blattel* and *Jones*. Here the government proved a vital fact: the number of the telephone at issue included an area code. In light of the evidence, it was not necessary for the court to take judicial notice of Continental's common carrier status, and the jury could draw an inference of such status from its common fund of knowledge. Since the evidence was sufficient to go to the jury, we find that defendants have not carried their burden under *Glasser*, and we reject their contentions on this point.

Entrapment and Due Process

Lentz argues that the evidence shows that he was entrapped as a matter of law. However, "[i]t is well settled that the question of entrapment, if fairly raised, is one for the jury." *United States v. Benavides*, 558 F.2d 308, 310 (5th Cir. 1977). The defendant must first present some evidence that the government agents induced him to commit the offense charged. *Id.*; *see also United States v. Wolffs*, 594 F.2d 77, 80 (5th Cir. 1979); *United States v. Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952). Then the government must prove beyond a reasonable doubt that "the accused was ready and willing, without persuasion and was . . . awaiting any propitious opportunity to commit the offense." *Wolffs*, 594 F.2d at 80; *see also Benavides, supra*; *Sherman, supra*. Put another way, the key to an entrapment defense is the accused's predisposition to commit the crime. *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); *Sherman v. United States*, 356 U.S. 369, 372, 78 S.Ct. 819, 820, 2 L.Ed.2d 848 (1958); *Sorrells v. United States*, 287 U.S. 435, 448-49, 53 S.Ct. 210, 215, 77 L.Ed. 413 (1932).

The testimony from the government's own witnesses was sufficient to sustain defendants' burden of production in the instant case. That is, it can be inferred from the testimony of Hall and others that Lentz was induced by government agents to participate in the wiretapping scheme; thus, the government of necessity shouldered the burden of persuasion on predisposition. Lentz argues that there is no evidence that he

had any predisposition to commit the acts alleged in the indictment and that the government's proof failed as a matter of law. We disagree. There was a great deal of evidence in the record from which the jury could find Lentz' predisposition: his statements that he knew the transaction was illegal, coupled with his willingness to continue his efforts to wiretap the phone; his volunteering to provide Hullum with eavesdropping devices; his exculpatory stories, told to the persons from whom he borrowed the equipment, regarding the use of the equipment; and his readiness to "take the rap" for the law enforcement officers should they be caught.

The court's charge on entrapment, to which Lentz makes no objection, correctly spells out the law and the burden of proof for the jury.[8] Thus, since the evidence

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8 Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment.
>
> If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred regarding the offenses charged in the indictment, the defendants William Lentz and R. C. Hullum were ready and willing to commit the crime as charged in the indictment, whenever the opportunity was afforded, and that law enforcement officers or their agents did no more than offer the opportunity, then the jury should find that the Defendants William Lentz and R. C. Hullum are not victims of entrapment.
>
> On the other hand, if the evidence in the case should

on predisposition was sufficient to go to the jury and since the jury was given correct guidance, we must uphold the jury's verdict of guilty. In other words, the evidence in Lentz' favor is not "so overwhelming that it [is] 'patently clear' or 'obvious' that [the accused] was entrapped as a matter of law." *United States v. Bower*, 575 F.2d 499, 504 (5th Cir. 1979), *quoting from United States v. Groessel*, 440 F.2d 602, 606 (5th Cir.), *cert. denied*, 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed.2d 713 (1971).

Lentz makes much of the fact that the entire plan was conceived by law enforcement officers and that his only motive was to help those officers catch criminals. However, entrapment is not necessarily present merely because government agents provide the opportunity or means to break the law. If Lentz was a willing, knowing, voluntary participant in an illegal scheme, and the jury found that he was, he was not entrapped.

Lentz also argues, and in this he is joined by Hullum, that the conduct of law enforcement agents is so outrageous in this case, and the degree of involvement by law officers so excessive, that due process principles absolutely bar the government from invoking judicial

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leave you with a reasonable doubt as to whether the Defendants had the previous intent or purpose to commit the offenses charged, apart fom the inducement or persuasion of some law enforcement officer or agent of the government, then it is your duty to find the Defendants William Lentz and R. C. Hullum not guilty.

process to obtain a conviction. We note that five members of the Supreme Court, in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), would accept the argument that in some circumstances government involvement in the crime charged could be so high as to bar prosecution. *See id.* at 491, 493, 96 S.Ct. at 1650, 1652 (Powell, J., joined by Blackmun, J., concurring); *id.* at 495, 96 S.Ct. at 1652 (Brennan, J., joined by Stewart, J., and Marshall, J., dissenting).[9]

We agree with Mr. Justice Powell in his analysis of the defense of entrapment in which he states that " 'entrapment' should now be employed as a term of art limited to [the concept of predisposition]. This does not mean, however, that the defense of entrapment necessarily is the only doctrine relevant to cases in which the government has encouraged or otherwise acted in con-

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9 In the opinion for the majority, written by Mr. Justice Rehnquist and joined by Chief Justice Burger and Mr. Justice White, the Court states that in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), it "ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case . . . where the predisposition of the defendant to commit the crime was established." 425 U.S. at 488-89, 96 S.Ct. at 1649. While concurring in the judgment of the case, Mr. Justice Powell, with Mr. Justice Blackmun, took issue with this holding. *See* 425 U.S. at 492-93, 96 S.Ct. at 1651-52. The concurring opinion points out that the Court had never had occasion to "confront Government overinvolvement in areas outside the realm of contraband offenses." *Id.* at 493, 96 S.Ct. at 1651. Mr. Justice Powell goes on to state, "In these circumstances, I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles." *Id.*, 96 S.Ct. at 1651-52.

cert with the defendant." *Id.* at 492 n.2, 96 S.Ct. 1651 (Powell, J., concurring) (citation omitted). At least two of our sister circuits have held that excessive governmental involvement in a crime will bar prosecution of a private citizen. *See United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). The Second Circuit has dicta to that effect. *See United States v. Archer*, 486 F.2d 670 (2d Cir. 1973). Our circuit has also indicated, in dicta, that it might accept the defense of outrageous governmental conduct. *See United States v. Till*, 609 F.2d 228, 230 (5th Cir. 1980). Therefore, we will assume, although we emphasize that we do not decide that the conduct of government agents could be so excessive and outrageous as to bar, on due process grounds, prosecution for a particular crime, even if the defendant is shown to have been predisposed to commit the crime.

Even so, while we might very well question the *wisdom* of the prosecutor's decision to bring charges against Lentz,[10] we cannot say with any certainty that it was fundamentally unfair to prosecute Lentz or Hullum. The only case cited by the Supreme Court in *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973), for the proposi-

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10 We here paraphrase Oscar Wilde and observe that if this is the way Burnet County treats its confidential informants, it doesn't deserve to have any. Oscar Wilde is reported to have opined, regarding conditions in Reading Gaol where he was incarcerated, "If this is the way the Queen treats her criminals, she doesn't deserve to have any."

tion that outrageous conduct might bar prosecution in a proper case, was *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). *Rochin* involved an accused who had had his stomach pumped by the police after his arrest, and this conduct by the police was held to be so shocking as to violate concepts of fundamental fairness under the due process clause. No such shocking occurrences took place in the instant case. After all, the jury could have believed that then Sheriff Hullum conceived the entire plan to wiretap the Maddox residence. Regardless of the undercover devices employed, it could hardly shock anyone's conscience to see an elected law enforcement official prosecuted for willfully and knowingly breaking a law designed to protect citizens from just such conduct.[11] While Lentz came into the plan late, he seems to have embraced it wholeheartedly, provided some of the means by which to carry it out, and taken part with full knowledge of the plan's illegality. The fact that Lentz was merely helping the police in their alleged efforts to catch criminals should not make prosecution of him unfair if he voluntarily and knowingly employed illegal methods. Were

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11 Hullum complains that the trial court refused to give his requested *jury charge* to the effect that it had to acquit him if it found that the actions of the government officers were contrary to common decency and fair play or were so outrageous and offensive as to violate due process. The government, in turn, argues that this is a question of law, not of fact, and was properly excluded from the jury charge. We hold that, as a matter of law, it was not unfair or outrageous to prosecute Hullum for the acts he was charged with committing and that the trial court correctly refused to give such a charge.

we to hold otherwise, it would be tantamount to giving police everywhere carte blanche to ignore laws that could have been passed to protect all citizens against improper invasions of their rights by police conduct.

"Burglary" Evidence

Lentz complains that evidence showing his willingness to break into the house at Granite Shoals and obtain serial numbers off the suspected stolen goods should never have been presented to the jury, since it was wholly irrelevant to the crime charged. Alternatively, he contends that if it had some relevance, it still should have been excluded under Fed.R.Evid. 403 as unfairly prejudicial. Lentz' attorney objected every time the prosecution sought to introduce evidence regarding the planned break-in, primarily on grounds that the prosecution continually referred to the operation as a "burglary" when in fact it would not have been a burglary under Texas law. The trial court continued to admit the evidence of Lentz' willingness to participate in the break-in but gave a limiting instruction in its charge in which it defined burglary under Texas law and told the jury that neither Lentz nor Hullum were on trial for burglary. Nevertheless, if the evidence was irrelevant or if its prejudicial nature substantially outweighed its probative value, it should have been excluded under the Federal Rules of Evidence. We will assume that Lentz' objections preserved this point on appeal.

Since the discussions about the proposed break-in were almost hopelessly intertwined with conversations about the wiretapping, we believe that the break-in evidence was necessary to the government in its attempt to tell the whole story of the crime.[12] The government draws support from *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), which approved of proof of extrinsic offenses under a common scheme or *res gestae* analysis "if the uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other.' " *Id.* at 911-12, n.15 (quoting Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L.Rev. 325, 331 (1956)). We believe that since Lentz was brought into the law enforcement group by Hullum both to perform the wiretap and to commit the break-in, evidence of the break-in would be relevant and admissible under *Beechum*.

The decision to exclude relevant evidence on grounds of its unfairly prejudicial nature rests in the first instance with the trial court, and we cannot hold, in the circumstances of this case, that the court abused its discretion in admitting this evidence. Even if we were to so hold, we would be inclined to find that the admission of this evidence was harmless error, since

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12 Of course, the evidence might be admissible under Fed.R.Evid. 404(b) as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. However, the government in its brief explicitly rejects this ground of admissibility and instead urges us to accept the "whole story" rationale.

the proof of Lentz' involvement in the wiretapping scheme was overwhelming.

The Indictment

Lentz and Hullum argue that the indictment was multiplicious because in one count Hullum was charged with endeavoring to intercept a wire communication, aided and abetted by Lentz, while in another count Lentz was charged with the substantive offense, aided and abetted by Hullum. The jury convicted on both counts, but the government elected at sentencing to proceed on only one substantive count for each appellant, and each was sentenced to concurrent sentences on the conspiracy and on one substantive count. We believe that the indictment was probably multiplicious, since it charged the same offense in two different counts. *See Gerberding v. United States*, 471 F.2d 55 (8th Cir. 1973). Nevertheless, a conviction obtained pursuant to a multiplicious indictment does not have to be reversed in all cases, "since an indictment may charge a single crime in a variety of forms to avoid a fatal variance of the evidence." *United States v. Dudley*, 581 F.2d 1193, 1199 (5th Cir. 1978) (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225, 73 S.Ct. 227, 231, 97 L.Ed. 260 (1952)). If a multiplicious indictment leads to cumulative sentences, the appropriate remedy is to remand for dismissal of one count. *Dudley*, 581 F.2d at 1199. Since Lentz and Hullum each received only *one* sentence on a substantive count, there is

no reason to upset the disposition made by the trial court. *See id.*

Lentz and Hullum also contend that they were prejudiced by the government's being allowed to go to trial on the fourth count of the indictment. This count charged them with possession of wiretapping instruments and was dismissed at the close of the government's case. The trial court entered a judgment of acquittal on count four because the telephone lineman's handset used by Lentz was not shown to be an instrument of wiretapping designed for that use. The court then reformed the indictment to reflect the acquittal. We do not think that the defendants have shown that the government knew that count four was frivolous. Nor do we think that allowing the government to present evidence on all four counts was unfairly prejudicial to either defendant.

Hullum contends that the indictment varied impermissibly from the proof offered at trial. Specifically, he points out that the indictment charges him with conspiracy and an attempt to tap the "telephone located at the residence of Patricia Maddox, Route 2, Box 72, Mormon Mill Road, Burnet County, Texas," while the evidence at trial showed that Patricia Maddox did not live in the Mormon Hill residence at the time of the alleged offense, although she had lived there previously. However, the evidence also showed that Hullum believed that the house was occupied by Maddox. We be-

have that a variance does exist, although it is a technical one and not necessarily fatal to the prosecution. *See United States v. Baldarrama*, 566 F.2d 560 (5th Cir. 1978), *cert. denied*, 439 U.S. 844, 99 S.Ct. 140, 58 L.Ed.2d 145 (1979). Hullum is not entitled to a reversal of his conviction unless his substantial rights have been affected. *See United States v. Tilton*, 610 F.2d 302 (5th Cir. 1980). Since Hallum does not allege that any of his substantial rights were affected by this or argue that he was prejudiced in any way by the error in the indictment, we reject this contention as a ground for reversal.

Jury Charge on Intent

Relying on *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), Lentz and Hullum urge us to find error in the trial court's instruction on intent and on the inferences permissible from the evidence. The pertinent part of the court's charge is set out in the margin.[13] We think that it is a permissible charge under our case law and does not incorrectly shift the burden of proof to defendants. In fact, the trial court adopted language that we found commendable in

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13 It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the Government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.

United States v. Chiantese, 560 F.2d 1244, 1255 (5th Cir. 1977) (en banc). We do not read *Sandstrom* as forbidding this type of charge, since the charge at issue is couched in permissive, not mandatory, language.

Miscellaneous Assertions of Error

Lentz argues that the trial court should have severed his case from Hullum's and that its refusal to do so denied Lentz a fair trial. When defendants are properly joined in the indictment, the denial of a motion for severance is subject to reversal only for abuse of discretion. *United States v. Cuesta*, 597 F.2d 903 (5th Cir. 1979). Defendant Lentz must make a strong showing of prejudice arising from a joint trial in order to gain reversal, *see United States v. Staller*, 616 F.2d 1284 (5th Cir. 1980) and he has not done so here. Lentz argues that his and Hullum's defenses were inconsistent, but in order to prevail Lentz had to show that "defenses . . . conflict[ed] to the point of being irreconcilable and mutually exclusive." *See United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978). The fact that Lentz had a traditional entrapment defense, while Hullum did not, is not grounds for severance. *See United States v. Eastwood*, 489 F.2d 818, 822 (5th Cir. 1973). Having been shown no compelling prejudice by Lentz, we uphold the action of the trial court.

Finally, Hullum charges the prosecution with two instances of misconduct. First, he alleges that the prosecution misled him by indicating in discovery that it was

capable of proving the essential elements of count four of the indictment, when that proved not to be the case at trial. We fail to see how Hullum was prejudiced by this action. We would point out that the government was required under the Jencks Act, 18 U.S.C. §3500, to deliver the discovery materials to Hullum, and *failure* by the government to do so would have been error. Second, Hullum contends that the government obtained his stipulation to the testimony of one witness, who the government asserted would have testified concerning Hullum's bad character. At a post-trial hearing this witness stated that he was unaware of appellant's character in the community and that his testimony would have been based upon an acquaintance with Hullum 12 or 13 years prior to the events charged. Hullum contends that the government knew before trial that the witness' testimony would have been inadmissible and that his stipulation was obtained by deceit. Since the government presented four other witnesses who testified that appellant Hullum's reputation for truth and honesty and for being a law-abiding citizen was bad, and three additional witnesses were encompassed within the stipulation to that effect, we fail to see how this one stipulation prejudiced Hullum's rights.[14]

For all of the foregoing reasons, the convictions are

AFFIRMED.

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14 Hullum presented six witnesses who testified to his good character.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Office of the Clerk

November 3, 1980

Gilbert F. Ganucheau
Clerk

TO ALL PARTIES LISTED BELOW:

NO. 79-5418 — U.S.A. v. WILLIAM L. LENTZ, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ SALLY HAYWARD
Deputy Clerk

cc: Mr. Charles O. Grigson
Mr. J. P. Darrouzet
Ms. LeRoy Morgan Jahn